UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

)
ELVIN MERCADO,)
Petitioner,)
V.) Civil No. 04-11653-PBS
UNITED STATES OF AMERICA,)
Respondent.)
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	,)
)

ASSENTED-TO MOTION OF PETITIONER FOR LEAVE TO FILE A SECOND AMENDED MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Pursuant to Federal Rule of Civil Procedure 15,¹ Petitioner Elvin Mercado hereby respectfully requests that the Court grant him leave to file a Second Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. In support of this motion, the undersigned states the following:

1. Mr. Mercado's original § 2255 motion, filed on July 13, 2004, requested relief on the ground that, *inter alia*, he was in the process of attempting to vacate two prior guilty pleas that were unconstitutionally entered in Lowell District Court. *See* Docket Nos. 1-2.

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Federal Rule of Civil Procedure 15(a) — made applicable to habeas proceedings by 28 U.S.C. § 2242, Federal Rule of Civil Procedure 81(a)(2), and Rule 12 of the Rules Governing Section 2255 Proceedings — allows a party to amend its pleadings by "leave of court" at any time during the proceeding. *See United States v. Hicks*, 283 F.3d 380, 386-87 (D.C. Cir. 2002).

- 2. Mr. Mercado conceded in his original § 2255 motion that his vacatur claim was "unripe," as the constitutional challenge to his convictions in state court was then still "under review." *Id.* Accordingly, on December 7, 2005, Mr. Mercado amended his § 2255 motion and omitted the unripe vacatur claim. *See* Docket No. 23.
- 4. On October 18, 2006, however, the Lowell District Court vacated Mr. Mercado's two prior state court convictions. *See* Memorandum in Support of Second Amended Motion under § 2255, Exhibit D. Thus, Mr. Mercado seeks leave to amend his § 2255 motion a second time to reinsert the now-ripe vacatur claim.
- 5. Counsel have conferred with counsel for the government, Assistant U.S. Attorney Peter K. Levitt, and the government assents to this motion.

For the foregoing reasons, Mr. Mercado respectfully requests that the Court grant him leave to file the enclosed Second Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

Respectfully submitted,

Dated: December 1, 2006

/s/ Roberto M. Braceras

Roberto M. Braceras (BBO# 566816) Robert J. Durbin (BBO# 658224) GOODWIN PROCTER LLP Exchange Place Boston, MA 02109-2881 (617) 570-1000

LOCAL RULE 7.1(A)(2) CERTIFICATION

The undersigned certifies that, pursuant to Local Rule 7.1(A)(2), the moving party has conferred with counsel for the government, Assistant U.S. Attorney Peter K. Levitt, on the matters set forth in the foregoing motion, and the government assents to this motion.

I further certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on December 1, 2006.

Respectfully submitted,

<u>/s/ Roberto M. Braceras</u>

Dated: December 1, 2006

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